85-763

No. ———

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

CARL ERSKINE WHITE,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PHILLIP S. RESNICK
Attorney for Carl Erskine White
510 Lumber Exchange Building
Ten South Fifth Street
Minneapolis, Minnesota 55402
(612) 339-0411
Attorney No. 90888

1985—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

QUESTION PRESENTED

I.

WHERE THE TRIAL COURT GRANTS THE PROSECUTION'S MOTION FOR MISTRIAL WITHOUT THE DEFENDANT'S CONSENT, ABSENT A MANIFEST NECESSITY, IS RETRIAL BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT?

INDEX

	Page
Question Presented	i
Index	iii
Citations to Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	6
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1

TABLE OF CITATIONS

Cases:

Abney v. United States, 431 U.S. 651 (1977)	4
Arizona v. Washington, 434 U.S. 497 (1977)	4
Benton v. Maryland, 395 U.S. 784 (1969)	4
Green v. United States, 355 U.S. 184 (1957)	4
Oregon v. Kennedy, 456 U.S. 667 (1982)	4, 5
State v. Carlson, 267 N.W.2d 170 (Minn. 1978)	6
State v. Gwara, 311 Minn. 106, 108 (1976)	5
United States v. Dinitz, 424 U.S. 600 (1976)	4, 5
United States v. Jorn. 400 U.S. 470 (1971)	4
United States v. Perez, 9 Wheat. 579 (1824)	4, 5

IN THE

Supreme Court of the United States

August 20, 1985

C3-85-156

CARL ERSKINE WHITE,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota, entered in the above-entitled case on August 20, 1985.

CITATIONS TO OPINIONS BELOW

The opinion of the Minnesota Supreme Court is not yet reported and is reprinted in Appendix A. The opinion of the Court of Appeals is reported at 369 N.W.2d 301 (Minn. App. 1985) and reprinted in Appendix B. The opinion of the trial court is not reported but is reprinted in Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was dated and entered on August 20, 1985. Jurisdiction is based upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following portions of the Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ., nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ., nor be deprived of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

On February 3, 1984, a complaint is issued by the Hennepin County Attorney's Office charging Carl Erskine White with the commission of criminal sexual conduct in the first degree under Minn. Stat. § 609.342 (d), § 609.11 and criminal sexual conduct in the third degree under Minn. Stat. § 609.344 (c). On February 13, 1984, the defendant first appeared and entered a plea of not guilty. On two separate occasions during the month of February 1984, the defendant appeared at the Hennepin County Medical Center for an examination to determine the presence or absence of venereal disease. On March 13, 1984, the defendant appeared for trial but the matter was continued pending results of medical tests of the victim and the defendant. On May 14, 1984, the matter was continued for the same purpose. On July 16, 1984, the matter was again

continued for the same purpose. On September 17, 1984, the matter was continued as no judges were available. On November 6, 1984, for the fifth time, defendant Carl Erskine White appeared for trial. Jury selection was completed, and trial commenced with the opening statements of counsel and the uncompleted direct testimony of the victim. During the course of his opening statement, the prosecutor stated that medical records revealed that the victim had a form of gonorrhea while the defendant did not. Additionally, the prosecution told the jury that it would introduce statistical evidence of the chances of a male contracting venereal disease through intercourse. Defense counsel promptly objected to this evidence as being irrelevant and invading the province of the jury. During the noon recess, in judge's chambers, the prosecutor determined that he had made an error during his opening statement concerning the medical records and moved for a mistrial. Defense counsel asserted that the statement was correct and that the evidence was relevant. Without the express consent of the defendant, the court granted the prosecutor's motion for a mistrial. On January 10, 1985, the trial judge, pursuant to defendant's motion, ordered a dismissal of the complaint on the grounds that the Fifth Amendment to the United States Constituion prohibits placing the defendant twice in jeopardy for a single offense.

On June 11, 1985, the State of Minnesota Court of Appeals (an intermediate appellate court) reversed the trial court's ruling and ordered the matter be set for trial. On August 20, 1985, the Supreme Court of the State of Minnesota (the highest appellate court in the State) denied further review.

REASONS FOR GRANTING THE PETITION

The opinion of the Court of Appeals clearly ignores those rights guaranteed a criminal defendant by the Fifth Amendment to the United States Constitution as expressed by this Court in *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1977); *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed. 543 (1971); *Green v. United States*, 355 U.S. 184, 75 S.Ct. 221, 2 L.Ed.2d 199 (1957); *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824).

The court held in *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), that the Double Jeopardy Clause of the Fifth Amendment applied to the states and protects a criminal defendant from repeated prosecutions for the same offense. In *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) the court ruled that the Double Jepoardy Clause is a guarantee against a defendant being twice put to trial for the same offense.

In *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), the court held that the Double Jeopardy Clause protects a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by miltiple prosecutions.

Oregon v. Kennedy, 456 U.S. 667, 672, 102 S.Ct. 2083, 2088, 72 L.Ed.2d 416, 421 (1982), repeated the "manifest necessity" standard originally set forth in *United States v. Perez*, 9 Wheat. 579, 580 (1824). This standard states that where the initial trial is terminated over the de-

fendant's objection "manifest necessity" is required to lift the double jeopardy bar to a second trial. *Perez* dealt with the hung jury which is the most common example of "manifest necessity." This standard provides a sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining the public's interest in fair trials designed to end in just judgments.

There was no showing of "manifest necessity" by the prosecution in this case. Had the trial court allowed the prosecutor to introduce statistical evidence, it is unlikely that the mistrial motion would have been made.

The trial court held "If the defendant consented to the mistrial, a retrial is usually permitted "unless the mistrial was necessitated by bad faith, intentional misconduct of the trial court or the prosecutor purposely designed to prejudice defendant's chances for an acquittal or goad him into requesting a mistrial." *State v. Gwara*, 311 Minn. 106, 108 (1976); see also *United States v. Dinitz*, 424 U.S. 600 (1976). The Minnesota Court of Appeals overruled the trial court and held that defense counsel impliedly consented to the mistrial. The trial court properly concluded that the defendant may still invoke the double jeopardy bar where the prosecutorial or judicial misconduct which gave rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. at 679, 102 S.Ct. at 2095, 72 L.Ed.2d at 428 (1982).

The prosecutor's conduct in this case was intentionally designed to induce the defendant to move for a mistrial. During his opening statement, the prosecutor told the jury that the medical records indicated that the victim had

a form of gonorrhea while the defendant did not. The prosecutor claims that he was not aware of this error until the judge called it to his attention during a recess. However, had the prosecutor reviewed the medical records prior to trial, he would not have made the statement and no mistrial would have been declared. The prosecutor had the duty to review these records timely and professionally and his failure to do so constituted a breach of that duty. This improper and prejudicial conduct may also be viewed as gross negligence constituting bad faith. The prosecutor also should have known that statistical evidence is inadmissible in Minnesota. See *State v. Carlson*, 267 N.W.2d 170 (Minn. 1978). It appears that this statement was made to provoke the defendant into moving for a mistrial since there is no other plausible reason for this statement. As a result, the defendant should be allowed to invoke the Double Jeopardy Clause of the Fifth Amendment as a bar to a second trial.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PHILLIP S. RESNICK
Attorney for Carl Erskine White
510 Lumber Exchange Building
Ten South Fifth Street
Minneapolis, Minnesota 55402
(612) 339-0411
Attorney No. 90888